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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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GROUP 3700

Application Number: 10/034,720
Filing Date: December 28, 2001
Appellant(s): BRAXTON, EARL J.

REMY J. VAN OPHEM
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/10/06 appealing from the Office action mailed 10/17/05.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct. It is noted that appellant has failed to point out in this section, the support for the "means plus function clause" of claim 1, line 10; however, this can be nothing other than the strips 14 that connect the wall panels 30,32,34 and 36 together and as such the issues are clear.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2,820,256	DAHL	1-1958
4,744,111	TEGG et al	5-1988
4,380,836	BRAXTON	4-1983

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-2,5,7,10,12,15,17 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dahl taken with Tegg et al.

Dahl teaches a toilet shelter employing four walls which can be folded to a state best shown in Fig. 2 where adjacent walls lie superimposed. Lacking in Dahl is a base which is circumscribed by the side walls. Tegg et al teach a knock down toilet where base 11 is employed and shown to be circumscribed by the sides of the unit. As both teach toilet enclosures it would have been obvious to the ordinary artisan to provide Dahl with a base and roof cooperating with the sides as taught by Tegg et al as the use of perfecting features of one device in the environment of another like device would have been prima facie obvious to the ordinary artisan, in order to glean the properties of said features.

Alternatively it would have been obvious to provide for the use of the wall connection scheme of Dahl to replace the scheme of Tegg et al as the two would have constituted obvious alternative assembly/disassembly schemes both shown used in identical art devices. The claim 5 "commode" is taught by Tegg et al at 53 and as Dalh

teaches in col. 1, line 17, "a temporary privy" it would have been obvious to employ a "commode" therein.

The various states of folding are nothing more than method of intended use and do not patentably define in this apparatus claim environment. Futhhermore, Dahl is capable of attaining any folded state that the instant device can attain.

Claims 3,8 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 1 above, and further in view of Braxton '836.

The latter teaches, in col. 3, lines 21+, the use of rivets to connect hinges to wall panels of portable toilets , the use of which in Dahl would have constituted an obvious expedient known to the ordinary artisan.

(10) Response to Argument

On page 7, appellant argues that the Fig. 2 state of Dahl is "not a transportable state" and points as evidence thereof, that the Dahl device is further folded and that the hinge 40 would interefer in a stacked mode of the Fig. 2 showing. It is unclear how hinge 40 of Dahl would interfere in a stacked mode any more than the instant hinge 14, particularly in view of the lack of disclosure of the thickness of either. The ascertion that hinge 40 "presents a serious problem" is pure speculation lacking supporting evidence.

On page 8, appellant introduces new arguments with latch 60 of Fig. 5 of Dahl as the main character. This plot falls as 60 is clearly indentified in col. 3, lines 51+, as employed only when "two walls sections of a wall of the enclosure are not directly hinged together." This is clearly not the case of the Fig. 2 embodiment relied upon.

On page 12, lines 18+, appellant argues against the combination of Dahl and Tegg et al and Braxton, urging that "the objects of each of the references are contrary to each other. " Tegg et al is applied merely to show that "knockdown" portable toilets can employ a "base" as shown at 11 and Braxton that rivets are known as connecting elements of hinge structure to wall panels of "knockdown toilets". These could have as well been held as official notice as they are commonly known and used in the portable toilet art. The sought after motivation is taught by the identical nature of the applied art and as such, the examiner takes issue with the arguments at the top of page 15 of the brief.

In response to applicant's argument, on pages 14-21, that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, clearly the use of a base or floor and the use of rivets to secure various components of portable toilets are not only taught by identical art devices in Dahl and Braxton but they are common knowledge to the ordinary artisan or the casual observer.

In response to applicant's argument, on page 23, that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Clearly the applied art here demonstrates that the knowledge was known in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Charles E. Phillips

Conferees:

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